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NO. PD-1100-17

IN THE TEXAS COURT OF CRIMINAL APPEALS

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THE STATE OF TEXAS
Petitioner
v.
CYNTHIA WOOD
Respondent

No. 01-16-00179-CR
In the First District Court of Appeals

No. 1445251
In the 351st District Court of Harris County, Texas
Hon. Mark Kent Ellis, Judge Presiding

BRIEF FOR RESPONDENT

ORAL ARGUMENT NOT PERMITTED

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STATEMENT OF THE CASE

Cynthia Kaye Wood was convicted of attempted capital murder in the 351st District Court of Harris County. The offense is a first-degree felony. Cynthia had pleaded guilty without an agreed recommendation. Following a sentencing hearing in which he considered a PSI report, the trial judge assessed Cynthia's punishment at life in prison.

Cynthia appealed. The First Court of Appeals held that Cynthia's sentence was illegal.[1] The Court reversed Cynthia's conviction for attempted capital murder and ordered the trial court to adjudge her guilty only of attempted murder.[2] The Court remanded the case to the trial court for the assessment of punishment for the second-degree offense of attempted murder.[3]

[1] *Wood v. State,* No. 01-16-00179-CR, 2017 WL 4127835 at *6 (Tex. App.—Houston [1st Dist.] Sep. 19, 2017, pet. granted) ("the trial court's sentence of life imprisonment in this case was 'illegal, unauthorized, and void.'") (quoting *Sierra v. State,* 501 S.W.3d 179, 185 (Tex. App.—Houston [1st Dist.] 2016, no pet.)).
[2] *Id.*
[3] *Id.*

STATEMENT REGARDING ORAL ARGUMENT

This Court has announced that oral argument will not be permitted.

ISSUE PRESENTED

The State frames the ground for review as follows:

> The lower court erred in holding that an indictment for criminal attempt is fundamentally defective when it does not allege the constituent elements of the underlying offense attempted.[4]

This is a misstatement. As discussed in Part Twelve of this brief, the Court of Appeals never said the indictment was fundamentally defective. This raises the question of whether the State's petition for discretionary review was improvidently granted. If the Court of Appeals did not find the indictment fundamentally defective, then how can such a (nonexistent) holding's propriety be appropriate for review?

The State does accurately say in its brief that:

> The court of appeals held that a purported indictment for attempted capital murder is merely an indictment for attempted murder when the State neglects to allege an "aggravating factor" that transforms murder into capital murder.[5]

A more apt description of the issue in this case might come from turning the foregoing statement into a question:

> Did the Court of Appeals correctly hold that a purported indictment for attempted capital murder is merely an indictment for attempted murder when no aggravating factor is alleged?

This is the question that is actually at issue in this case.

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[4] *See* State's Brief at 5.

[5] State's Petition for Discretionary Review at 3-4; State's Brief at 8.

STATEMENT OF FACTS

The indictment in this case alleged, in pertinent part, that Cynthia Kaye Wood

> did then and there unlawfully, intentionally, with the specified intent to commit the offense of CAPITAL MURDER of K.W., hereafter styled the Complainant, do an act, to-wit: USE HER HAND TO IMPEDE THE COMPLAINANT'S ABILITY TO BREATHE, which amounted to more than mere preparation that tended to but failed to effect the commission of the offense intended.[6]

As noted by the First Court of Appeals:

> the indictment tracked the language of Penal Code sections 19.02(b)(1) (murder) and 15.01(a) (criminal attempt), but it did not allege any of the aggravating circumstances that elevate the offense of murder to capital murder.[7]

Cynthia pleaded guilty to the first-degree-felony offense of attempted capital murder.[8] The trial judge found Cynthia guilty and assessed her punishment at life in prison.[9] The life sentence was within the range of punishment set by the Legislature for conviction of a first-degree felony.[10] However, the life sentence was outside the range of punishment set by the Legislature for conviction of a second-degree felony.[11]

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[6] C.R. at 32. Most of this portion of the indictment was recited by the Court of Appeals in its opinion. *See Wood v. State,* 2017 WL 4127835 at *5.
[7] *Id.*
[8] C.R. at 62.
[9] 1 R.R. at 50.
[10] *See* Tex. Penal Code Ann. § 12.32(a) (West 2011) ("An individual adjudged guilty of a felony of the first degree shall be punished by imprisonment in the Texas Department of Criminal Justice for life or for any term of not more than 99 years or less than 5 years.").
[11] *See* Tex. Penal Code Ann. § 12.33(a) (West 2011) (20-year maximum term of imprisonment for second-degree felony).

Cynthia appealed. One of her issues on appeal was that her sentence was illegal.[12] She reasoned that because the indictment contained no aggravating element, her conviction for attempted capital murder – a first-degree felony – was unauthorized.[13] She argued that the indictment authorized a conviction only for attempted murder – a second degree felony.[14] Thus, she asserted that a sentence of imprisonment for a term of longer than the second-degree felony maximum of 20 years was illegal.[15]

The First Court of Appeals agreed and held that Cynthia's sentence was illegal.[16] The Court reversed Cynthia's conviction for attempted capital murder and ordered the trial court to adjudge her guilty only of attempted murder.[17] The Court remanded the case to the trial court for the assessment of punishment for the second-degree offense of attempted murder.[18]

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[12] *See* Brief for Appellant at 65-66; Appellant's Supplemental Reply Brief at 5-10.
[13] Appellant's Supplemental Reply Brief at 8-9.
[14] *Id.* at 9. As the First Court of Appeals put it, Cynthia argued "that her life sentence is illegal because the indictment only authorized a second-degree felony conviction." *Wood v. State,* 2017 WL 4127835 at *4.
[15] Appellant's Supplemental Reply Brief at 9.
[16] *Wood v. State,* 2017 WL 4127835 at *6 ("court's sentence of life imprisonment in this case was 'illegal, unauthorized, and void.'").
[17] *Id.*
[18] *Id.*

SUMMARY OF THE ARGUMENT

Cynthia's argument is divided into 14 parts.

Part One sets out the controlling rule in this case which comes from this Court's opinion in *Thomason v. State*:[19]

> [W]here an indictment facially charges a complete offense, it is reasonable to presume the State intended to charge the offense alleged, and none other. Consequently, where an indictment facially charges a complete offense, the State is held to the offense charged in the indictment, regardless of whether the State intended to charge that offense.[20]

Part Two discusses this Court's opinion in *Kirkpatrick v. State*[21] and explains why the opinion does not alter or weaken the *Thomason* rule. Part Three discusses the rationale for the *Thomason* rule – due process.

Part Four addresses the 1985 amendments to the Texas Constitution and statutes and the corresponding changes to the concept of fundamental error. This part also explains why *Studer v. State*[22] (and the idea that indictments omitting an element of an offense can still support convictions) is inapplicable.

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[19] *Thomason v. State,* 892 S.W.2d 8 (Tex. Crim. App. 1994).
[20] *Id.* at 11 (emphasis added).
[21] *Kirkpatrick v. State,* 279 S.W.3d 324 (Tex. Crim. App. 2009).
[22] *Studer v. State,* 799 S.W.2d 263 (Tex. Crim. App. 1990).

Part Five describes how the First Court of Appeals followed *Thomason* in deciding the current case. Part Six illustrates why the Court of Appeals acted appropriately in reforming the judgment. This Court's opinion in the leading case of *Calton v. State*[23] is reviewed.

Part Seven uses the *Calton* case to expound upon why the reformation of a judgment often results in an illegal sentence. This case involves an illegal sentence. Part Eight discusses the opinions of this Court recognizing that an illegal sentence can be noticed and corrected at any time.

Part Nine is a pause to explain that the first eight parts of the brief serve as preparation to consider the State's four main arguments. These four main arguments are addressed in Parts Ten, Eleven, Twelve, and Thirteen.

Part Ten and Part Eleven discuss two intermediate appellate court opinions on which the First Court of Appeals relied. The cases are *Sierra v. State*[24] (State's first main argument) and *Crawford v. State,*[25] (State's second main argument).

The State's third main argument – that the Court of Appeals' holding is erroneous – is countered in Part Twelve. The alleged error is the Court's supposed holding that an indictment for criminal attempt is "fundamentally defective" when the

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[23] *Calton v. State,* 176 S.W.3d 231 (Tex. Crim. App. 2005).
[24] *Sierra v. State,* 501 S.W.3d 179 (Tex. App.—Houston [1st Dist.] 2016, no pet.).
[25] *Crawford v. State,* 632 S.W.2d 800 (Tex. App.—Houston [14th Dist.] 1982, pet. ref'd).

constituent elements of the underlying offense attempted are not alleged. As explained, however, the Court of Appeals did not so hold.

Part Thirteen contains Cynthia's response to the State's fourth main argument. That argument is that Penal Code, Section 15.01(b)[26] does not apply to the present case because capital murder is not an aggravated offense.

Part Fourteen recaps Cynthia's argument.

[26] Tex. Penal Code Ann. § 15.01(b) (West 2011).

ARGUMENT

PART ONE: The Rule of *Thomason v. State*

One key case. Just one. Sometimes that is all it takes to resolve an appeal.

This is one of those appeals. An opinion of this Court back in 1994 should lead this Court to affirm the decision of the First Court of Appeals under consideration today. The opinion is *Thomason v. State.*[27]

Gary Thomason worked for Electronic Data Systems (EDS).[28] He wasn't a very good employee. In fact, he cheated the company. He had a real scheme going.[29] Thomason would submit invoices for non-existent computer equipment.[30] It took a while for EDS to figure out what was going on. In a single year, the company cut Thomason ten separate checks totaling $518,787 to pay for the invoices.[31] Eight of the ten checks were for more than $20,000 each.[32]

Finally, the company found out its employee had gone rogue. A Collin County grand jury got involved and handed up an indictment.[33] And this is where things got interesting from a legal perspective.

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[27] *Thomason v. State,* 892 S.W.2d 8 (Tex. Crim. App. 1994).
[28] *Id.* at 9.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.* at 10.
[33] *See id.* at 9.

The indictment charged Thomason with theft of currency "of the value of at least Twenty Thousand dollars ($20,000.00)."[34] But what the indictment did not do was charge Thomason with obtaining the ten checks "pursuant to one scheme or continuing course of conduct."[35] This was a significant omission. Without that language in the indictment, Thomason could not be prosecuted for "aggregated theft" (which would have amounted to more than $500,000).[36] The opinion explained why.

> [T]he indictment alleged the facially complete offense of theft under [Penal Code] § 31.03. The elements constituting an offense under § 31.03 are: a person, with the intent to deprive the owner of property, unlawfully appropriates that property, without the effective consent of the owner. Only when an indictment additionally alleges that the property was taken "pursuant to one scheme or continuing course of conduct," does the indictment charge an aggregated theft under [Penal Code] § 31.09.[37]

This Court then set out a rule which controls the outcome today.

> **[W]here an indictment facially charges a complete offense, it is reasonable to presume the State intended to charge the offense alleged, and none other. Consequently, <u>where an indictment facially charges a complete offense, the State is held to the offense charged in the indictment</u>, regardless of whether the State intended to charge that offense.[38]**

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[34] *Id.*

[35] *Id.* at 10.

[36] *Id.* Thus, Thomason avoided a more serious conviction and penalty because the penalty for theft depends on the value of the property stolen. Under current law, if the property has a value of less than $100, the offense is a Class C misdemeanor. Tex. Penal Code Ann. § 31.03(e)(1) (West Supp. 2017). This is the least serious penalty. The most serious penalty is a first-degree felony – reserved for when the property's value is $300,000 or more. Tex. Penal Code Ann. § 31.03(e)(7) (West 2017).

[37] *Thomason v. State,* 892 S.W.2d at 10. "The allegation that the values of the property taken were aggregated because that property was taken pursuant to a continuing course of conduct *is an element of the offense and must be included in the indictment." Id.* (emphasis in original) (quoting *Whitehead v. State*, 745 S.W.2d 374, 376 (Tex. Crim. App. 1988).

[38] *Thomason v. State,* 892 at 11 (emphasis added) (citing *Fisher v. State,* 887 S.W.2d 49, 55, 57 (Tex. Crim. App. 1994)).

PART TWO: *Kirkpatrick v. State* does not make *Thomason* Inapplicable

In *Kirkpatrick v. State,*[39] this Court considered two indictments charging the defendant with the offense of tampering with a government record.[40] Both the defendant and the State agreed that the faces of the two indictments alleged misdemeanor tampering with a governmental record.[41] This was because "the indictments failed to contain language that would charge a felony offense."[42]

But there was, of course, a point of disagreement between the parties.

The defendant contended that the district court in which the defendant was convicted did not have jurisdiction because no felony had been charged.[43] Such a claim of jurisdiction, the defendant maintained, was not waived by not objecting prior to trial.[44]

The State argued that the district court did have jurisdiction because the State had intended to charge a felony offense.[45] That intent was evidenced by the fact that the indictments "were returned to a [district] court with subject-matter jurisdiction over only felony offenses."[46] The State said the failure of the two indictments to

[39] *Kirkpatrick v. State,* 279 S.W.3d 324 (Tex. Crim. App. 2011).
[40] *Id.* at 324-25.
[41] *Id.* at 326.
[42] *Id.* (brackets in original omitted) (emphasis added).
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.* (emphasis added).

allege all of elements of felony tampering with evidence was a defect of substance.[47] Therefore, the State maintained, it was incumbent upon the defendant to raise the defect before the day of trial.[48]

The State acknowledged that the holding in *Thomason* foreclosed its argument, but argued that *Thomason* was no longer fully in force. This Court described the State's position as follows:

> The state acknowledges that in *Thomason v. State,* 892 S.W.2d 8, 11 (Tex. Crim. App. 1994), we held that "where an indictment facially charges a complete offense, it is reasonable to presume that the State intended to charge the offense alleged, and none other." We stated, "Consequently, where an indictment facially charges a complete offense, the State is held to the offense charged in the indictment, regardless of whether the State intended to charge that offense." *Id.* However, the State suggests that, in *Teal v. State,* 230 S.W.3d 172 (Tex. Crim. App. 2007), we retreated from such all-inclusive language.[49]

This Court did not agree with the State that the *Teal* opinion had diluted the effect of *Thomason.* Rather, this Court said *Thomason* was "distinguishable on its facts."[50] There were "at least two grounds" that distinguished *Thomason* from the *Kirkpatrick* case.[51] One of those grounds was that in *Thomason,* the indictment "alleged a felony, albeit not the felony the State intended to charge."[52] So "[t]here was no

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[47] *Id.*
[48] *Id.*
[49] *Id.* at 327.
[50] *Id.*
[51] *Id.*
[52] *Id.* at 327-28.

question that the trial court had subject-matter jurisdiction over the offense alleged on the face of the indictment."[53]

In *Kirkpatrick,* on the other hand, the indictment facially alleged a misdemeanor.[54] Thus, there existed a real question as to whether the trial court (a district court) had subject-matter jurisdiction over the case. The State suggested

> that, because the indictments were returned to a district court, a court with subject-matter jurisdiction over felonies, and a felony offense of tampering with a governmental record exists, it is clear that the state intended to charge a felony offense.[55]

This Court agreed with the State. Writing for a unanimous Court, Judge Johnson said:

> Here, although the indictment properly charged a misdemeanor and lacked an element necessary to charge a felony, the felony offense exists, and the indictment's return in a felony court put appellant on notice that the charging of the felony offense was intended.[56]

The situation in the current case, of course, is different. Both the offense of attempted capital murder and the offense of attempted murder are felonies. Thus, the fact the indictment was returned to a district court did not put Cynthia on notice she was being charged with attempted capital murder. The *Thomason* rule is still applicable in the current case.

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[53] *Id.* at 328.
[54] *Id.* at 326.
[55] *Id.* at 328.
[56] *Id.* at 329.

One further statement by this Court in *Kirkpatrick* warrants comment. The *Kirkpatrick* opinion noted that the face of the indictment contained a heading stating that the defendant was charged with a felony.[57] This statement bolstered this Court's conclusion that the return of the indictment to a district court notified the defendant that a felony was being charged. But this was only a supporting fact – not the fact that caused this Court not to follow the *Thomason* rule.

In the current case, the heading on the indictment declared that the charge against Cynthia was "attempted capital murder."[58] One could argue that this heading put Cynthia on notice that she was being charged with attempted capital murder. But the heading did not serve to identify the aggravating factor that transformed the offense of attempted murder into attempted capital murder. And as the First Court of Appeals declared in its opinion:

> The requirement that the indictment allege the aggravating factor under section 19.03(a)(2) is particularly important given that the statute lists nine possible aggravating circumstances elevating the offense of murder to capital murder.[59]

Even considering its heading, the indictment against Cynthia simply does not inform her of the aggravating factor transforming attempted murder into attempted capital murder. And that is the problem at the heart of Cynthia's appeal. The

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[57] *Id.*
[58] C.R. at 32.
[59] *Wood v. State,* 2017 WL 4127835 at *5.

indictment does not give Cynthia adequate notice of the charge against her. As this Court proclaimed in *Riney v. State*:

> "It has long been held that [notice of the nature and cause of the accusation] must come from the face of the indictment. Indeed, the accused is not required to look elsewhere." *Ward v. State,* 829 S.W.2d [787] at 794 [(Tex. Crim. App. 1992)]. See also *Eastep v. State,* 941 S.W.2d 130, 132 (Tex. Crim. App. 1997); *Labelle v. State*, 720 S.W.2d 101, 110 (Tex. Crim. App. 1986) (Article I, Section 10 of the Texas Constitution mandates that notice must come from the face of the indictment); *Voelkel v. State,* 501 S.W.2d 313, 315 (Tex. Crim. App. 1973). And it is not sufficient to say that the accused knew with what offense he was charged. The inquiry must be whether the charge, in writing, furnished that information in plain and intelligible language. *Benoit v. State,* 561 S.W.2d 810, 813 (Tex. Crim. App. 1977).[60]

The key takeaway from *Riney* as it pertains to the current case is clear. It is not sufficient to say that Cynthia knew the offense with which she was charged. She need not have looked elsewhere than the indictment. And the indictment failed – utterly – to inform her of the aggravating factor that raised the attempted murder charge to attempted capital murder.

[60] *Riney v. State,* 28 S.W.3d 561, 565 (Tex. Crim. App. 2000) (emphasis added) (first set of brackets in the original) (cited with approval by the First Court of Appeals in its opinion on review here – *Wood v. State,* 2017 WL 4127835 at *5.).

PART THREE: The Rationale for the *Thomason* Rule

Two words are in order here: due process.

The *Thomason* Court cited no less an authority than the United States Supreme Court to justify its new rule. *Dunn v. United States* recognized that upholding a conviction on a charge not alleged in an indictment "offends the most basic notions of due process."[61] And *Cole v. Arkansas* acknowledged that due process is violated if a defendant is convicted "upon a charge that was never made."[62]

In *Thomason,* "the continuing course of conduct language was not alleged" in the indictment.[63] But the indictment did charge the offense of theft.[64] Thus, "the State was committed to that theory of prosecution."[65] Allowing the State to proceed with an aggregated theft charge not alleged in the indictment would have violated the defendant's right to adequate notice.[66] This Court made this point clear eighteen years ago in *Riney v. State*:

> "It has long been held that [notice of the nature and cause of the accusation] must come from the face of the indictment. Indeed the accused is not required to look elsewhere." *Ward v. State,* 829 S.W.2d at

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[61] *Dunn v. United States,* 442 U.S. 100, 106, 99 S.Ct. 2190, 2194, 60 L.Ed.2d 743 (1979) (cited in *Thomason v. State,* 892 S.W.2d at 11, n. 7).
[62] *Cole v. Arkansas,* 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed.2d 644 (1948) (cited in *Thomason v. State,* 892 S.W.2d at 11, n. 7). *See also Jackson v. Virginia,* 443 U.S. 307, 314, 99 S.Ct. 2781, 2786, 61 L.Ed.2d 560 (1979) (emphasis added) ("It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process."). This quotation was quoted verbatim by this Court in *Gollihar v. State,* 46 S.W.3d 243, 246 (Tex.Crim.App.2001).
[63] *Thomason v. State,* 892 S.W.2d at 12.
[64] *Id.*
[65] *Id.*
[66] Accordingly, the judgment of the Court of Appeals was vacated. *Id.*

> 794. And it is not sufficient to say that the accused knew with what offense he was charged. The inquiry must be whether the charge, in writing, furnished that information in plain and intelligible language.[67]

Here, it is simply not sufficient to say that Cynthia knew the offense with which she was charged. The relevant inquiry concerns the offense charged on the face of the indictment. Cynthia was not required to look elsewhere.

[67] *Riney v. State,* 28 S.W.3d at 65 (some citations omitted) (bracketed language in original) (citing *Ward v. State,* 829 S.W.2d 787, 794 (Tex. Crim. App. 1992)).

PART FOUR: *Studer v. State* does not apply in a *Thomason* Situation

In 1985, Texas voters approved an amendment to Article V, Section 12 of the Texas Constitution.[68] That same year, the Legislature amended Article 1.14(b) of the Texas Code of Criminal Procedure. [69]

Prior to these amendments, the failure of a charging instrument to allege all of the elements of an offense was considered a "fundamental defect."[70] This fundamental defect served to deprive the trial court of jurisdiction.[71] And the defect could be raised for the first time on appeal or in a post-conviction application for a writ of habeas corpus.[72] This was because such a fundamental defect rendered a judgment of conviction void.[73] Put somewhat differently, a charging instrument that failed to allege all the elements of a particular offense, could not support a conviction for that offense.

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[68] *See Ex parte Patterson,* 969 S.W.2d 16, 18 (Tex. Crim. App. 1998).
[69] *See id.*
[70] *See id.* Numerous opinions of this Court recognized that indictments were fundamentally defective when a charging instrument failed to allege all the elements of an offense. *See e.g., Ex parte Abbey,* 574 S.W.2d 104, 105 (Tex. Crim. App. [Panel Op.] 1982) ("We hold that the information fails to allege a necessary element of the offense charged and is therefore fundamentally defective."); *Ex parte Walling,* 605 S.W.2d 621, 622 (Tex. Crim. App. 1980) (charging instrument was "fatally defective"); *Ex parte Cannon,* 546 S.W.2d 266, 273 (Tex. Crim. App. 1976); *Standley v. State,* 517 S.W.2d 538, 539 (Tex. Crim. App. 1975) (indictment that omitted necessary element of offense was "fundamentally defective"); *Martini v. State,* 32 S.W.2d 654 (Tex. Crim. App. 1930).
[71] *See Ex parte Patterson,* 969 S.W.2d at 18.
[72] *See id.*
[73] *See Jones v. State,* 611 S.W.2d 87, 89 (Tex. Crim. App. 1981) ("indictment which fails to allege all of the elements of an offense is void"); *Ex parte Seaton,* 580 S.W.2d 593, 594 (Tex. Crim. App. [Panel Op.] 1979) (same).

The 1985 amendments changed things. Under the new law, the failure of an indictment to allege all of the elements of an offense does not render that indictment void.[74] Such an indictment is no longer fundamentally defective.[75] Now, in the absence of a pre-trial objection, an indictment that omits an element of a particular offense can support a conviction for that offense.[76]

The opinion that first recognized this effect of the 1985 amendments was, of course, *Studer v. State.*[77] One might suppose that *Studer* would allow for a conviction for aggregated theft in a *Thomason* situation despite the omission of any continuing-course-of-conduct language. After all, as noted in the paragraph above, an indictment omitting a particular element of an offense can still support a conviction for that offense.[78]

> Such a supposition, however, would be wrong. As explained in *Thomason*:
>
> > We are aware that under *Studer v. State,* 799 S.W.2d 263 (Tex. Cr. App. 1990), a conviction will not be overturned where the indictment contains a substantive defect, for example, where the indictment omits a necessary element of the offense. *Id.* at 273. However, where the indictment charges a facially complete offense, as in the instant case, we cannot presume a defect exists and *Studer* is simply not applicable.[79]

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[74] *Ex parte Patterson,* 969 S.W.2d at 19.
[75] *Id.*
[76] *Id.* This is not to say all is well with such a charging instrument. A charging instrument that omits an element of a particular offense still contains a "substantive defect" that is subject to a motion to quash.
[77] *Studer v. State,* 799 S.W.2d 263 (Tex. Crim. App. 1990).
[78] *See Ex parte Patterson,* 969 S.W.2d at 119.
[79] *Thomason v. State,* 892 S.W.2d at 11, n.5.

PART FIVE: The First Court of Appeals followed *Thomason*

The relevant portion of the indictment in the current case was set out in the Court of Appeals' opinion. The indictment charged that Cynthia Wood did

> unlawfully, intentionally, with the specific intent to commit the offense of CAPITAL MURDER of K.W., hereafter styled the Complainant, do an act, to-wit: USE HER HAND TO IMPEDE THE COMPLAINANT'S ABILITY TO BREATHE, which amounted to more than mere preparation that tended to but failed to effect the commission of the offense intended.[80]

The Court of Appeals immediately recognized that it had a *Thomason* situation on its hands. While the State had intended to charge Cynthia with attempted capital murder, the indictment failed to do so.[81] The indictment properly tracked the language of the Texas Penal Code's murder statute and criminal attempt statute.[82] But the indictment "did not allege any of the aggravating circumstances that elevate the offense of murder to capital murder."[83] Thus, the indictment charged Cynthia with attempted murder, but not with attempted capital murder.[84] And as this Court educated all of us in *Thomason,* when an indictment charges a complete offense

> the State is held to the offense charged in the indictment, regardless of whether the State intended to charge that offense.[85]

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[80] *Wood v. State,* 2017 WL 4127835 at *5.
[81] *Id.*
[82] *Id. See* Tex. Penal Code Ann § 19.02(b)(1) (West 2011) (murder) and Tex. Penal Code Ann. § 15.01(a) (West 2011) (criminal attempt).
[83] *Wood v. State,* 2017 WL 4127835 at *5. As the Court also said, "the aggravating factor was missing from the indictment." *Id.*
[84] *Id.*
[85] *Id.* (quoting from *Thomason v. State,* 892 S.W.2d at 11).

Given that the State is held to the offense charged in the indictment (attempted murder), Cynthia's conviction for attempted capital murder cannot stand. "The indictment . . . did not authorize a conviction for attempted capital murder, and the State is held to the offense charged in the indictment."[86]

[86] *Wood v. State,* 2017 WL 4127835 at *5. A conviction is simply not authorized on a theory that is not alleged in the charging instrument. *See Rodriguez v. State,* 18 S.W.3d 228, 232 (Tex. Crim. App. 2000).

PART SIX: The Court of Appeals appropriately reformed the Judgment

As detailed above, the Court of Appeals held that the indictment in the current case did not authorize a conviction for attempted capital murder.[87] But the indictment did authorize a conviction for attempted murder.[88] Given that Cynthia had pleaded guilty to the attempted murder charge alleged in the indictment, the court of appeals' course of action was clear. The judgment needed to be reformed to reflect that Cynthia was guilty of attempted murder – not attempted capital murder. And the Court of Appeals did just. "We reverse appellant's conviction for attempted capital murder [and] order the trial court to adjudge appellant guilty of attempted murder."[89]

The Court of Appeals' action was countenanced – indeed, required – by this Court's holding in *Calton v. State.*[90] A brief discussion of the *Calton* case is in order.

The basic offense of evading arrest is a Class A misdemeanor.[91] At the time *Calton* was decided, the offense became a state jail felony if the actor used a vehicle while in flight.[92] And the offense became a third-degree felony if the actor used a vehicle while in flight and had previously been convicted of evading arrest.[93]

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[87] *Wood v. State,* 2017 WL 4127835 at *5.
[88] *Id.* at *4.
[89] *Id.* at *6.
[90] *Calton v. State,* 176 S.W.3d 231 (Tex. Crim. App. 2005).
[91] *See* Tex. Penal Code Ann. § 38.04(b) (West 2016).
[92] *Calton v. State,* 176 S.W.3d at 234.
[93] *Id.*

The indictment alleged that Allen Calton used a vehicle in flight and had previously been convicted of evading arrest.[94] Thus, the indictment charged Calton with the third-degree-felony version of evading arrest.[95] Unlike the *Thomason* case and the case at bar, the indictment alleged precisely what the State intended to charge.[96] The problem in *Calton* was not with the indictment, but with the proof. The state put on evidence during the guilt phase of trial of Calton's flight in a vehicle.[97] But the State did not introduce any evidence of his prior conviction for evading arrest until the trial's punishment phase.[98]

Calton argued that the State failed to prove an essential element of third-degree-felony evading arrest – the prior conviction – during the trial's guilt phase.[99] Accordingly, he argued that he had only been convicted of state-jail-felony evading arrest – not third-degree felony evading arrest.[100]

In an opinion by Judge Keasler, this Court agreed, holding that "a prior conviction for evading arrest is an element of third-degree evading arrest."[101] Therefore, the prior conviction had to "be proved at the guilt phase of trial."[102]

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[94] *Id.* at 232.
[95] *See id.*
[96] *See id.*
[97] *Id.*
[98] *Id.* at 233.
[99] *Id.*
[100] *Id.* Proof had been made during the guilt phase of Calton's flight from peace officers. *Id.* at 232. Thus, the essential elements of state-jail-felony evading arrest had been proved.
[101] *Id.* at 234.

For purposes of this argument, the fact that a prior conviction for evading arrest is an element of third-degree evading arrest is not the important point. What is important is what this Court did with the case after reaching the foregoing conclusion. This Court reformed the judgment to reflect a conviction for the state-jail-felony version of evading arrest.[103] This was because there was proof of the state-jail-felony offense, but no proof of the third-degree-felony offense.

[102] *Id.*

[103] *Id.* at 236. This Court affirmed the Court of Appeals' decision. *Id.* at 233.

PART SEVEN: When a Judgment is Reformed, an Illegal Sentence often Results

To explain this concept, let's continue with our discussion of the *Calton* case. Allen Calton had his sentence reformed to reflect a judgment of conviction for a state jail felony.[104] With enhancements for two prior convictions (other than the previous evading arrest offense) the maximum sentence he could receive was 20 years.[105] But under his original third-degree-felony-evading-arrest conviction, he was sentenced to 50 years in prison.[106] The 50-year sentence was above the maximum sentence for a state-jail felony – even with the two enhancements. Therefore, this Court found Calton's sentence to be illegal. As mentioned earlier, this Court affirmed the Court of Appeals' judgment reforming Calton's judgment to reflect a state-jail-felony conviction.[107] But this was not the only action of the Court of Appeals that this Court affirmed. This Court also approved that part of the Court of Appeals' judgment remanding the case to the trial court for a new punishment hearing.[108] At the new punishment hearing, the trial court would have to sentence Calton to a term of years within the 20-year maximum.

The current case presents much the same situation. Cynthia was convicted of attempted capital murder – a first-degree felony. The maximum term of

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[104] *See* preceding footnote and accompanying text.
[105] *Calton v. State,* 176 S.W.3d at 233.
[106] *Id.*
[107] *See* Footnote 103 and accompanying text.
[108] *See Calton v. State,* 176 S.W.3d at 233, 236.

imprisonment for a first-degree felony is life[109] and that is exactly what Cynthia got.[110] But as explained in Part Five of this brief, Cynthia's conviction for attempted capital murder could not stand. And as explained in Part Six, Cynthia's conviction for attempted murder was reformed to reflect a conviction for attempted murder – a second-degree felony. The maximum sentence of confinement for a second-degree felony is 20 years.[111] Clearly, Cynthia's life sentence was far in excess of the maximum term of confinement for a second-degree felony. Thus, her sentence was illegal – just as the sentence was illegal in *Calton.* The Court of Appeals put it this way:

> The crime charged in the indictment was attempted murder which is a second-degree felony offense with a maximum sentence of twenty years. A sentence that is outside the maximum or minimum range of punishment is unauthorized by law and therefore illegal. *Mizell v. State,* 119 S.W.3d 804, 806 (Tex. Crim. App. 2003). Consequently, the trial court's sentence of life imprisonment in the case was illegal, unauthorized, and void.[112]

Consistent with *Calton,* the Court of Appeals remanded the case to the trial court for the proper assessment of punishment.[113]

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[109] Tex. Penal Code Ann. § 12.32(a) (West 2011).
[110] *See Wood v. State,* 2017 WL 4127835 at *1, *6.
[111] Tex. Penal Code Ann. § 12.33(a) (West 2011).
[112] *Wood v. State,* 2017 WL 4127835 at *6. The Court of Appeals also cited *Ex parte Rich*, 194 S.W.3d 508, 512 (Tex. Crim. App. 2006). The *Rich* case stands for the idea that "a mischaracterization of [an] offense in [an] indictment resulted in [a] sentence in violation of law."
[113] *Wood v. State,* 2017 WL 4127835 at *6 ("The remedy for a non-negotiated guilty plea that leads to an illegal sentence is remand for the proper assessment of punishment.") (citing *Ex parte Rich,* 194 S.W.3d at 514-15).

PART EIGHT: An Illegal Sentence can be Noticed and Corrected at any Time[114]

"A trial or appellate court which otherwise has jurisdiction over a criminal conviction may always notice and correct an illegal sentence." So said this Court in *Mizell v. State* in 2003.[115] *Mizell* was the only opinion of this Court cited for this proposition by the Court of Appeals in this case.[116] But this Court has made similar announcements in cases both before and after *Mizell*.

In the 2006 case of *Ex parte Rich,* this Court allowed a habeas petitioner to raise an illegal-sentence argument.[117] Equating illegal sentences and void sentences, this Court declared that "a defect that renders a sentence void may be raised at any time."[118]

Cases prior to *Mizell* include *Ex parte Beck*.[119] The *Beck* case involved another habeas applicant who alleged that his 25-year sentence exceeded the statutory

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[114] The State does not dispute this point.
[115] *See Mizell v. State*, 119 S.W.2d 804, 806 (Tex. Crim. App. 2003). This Court also said "[t]here has never been anything in Texas law that prevented *any* court with jurisdiction over a criminal case from noticing and correcting an illegal sentence." *Id.* (emphasis in original).
[116] *See Wood v. State,* 2017 WL 4127835 at *4. The Court of Appeals cited two intermediate appellate court opinions as support. *Id.*
[117] *Ex parte Rich,* 194 S.W.3d 508, 511 (Tex. Crim. App. 2006).
[118] *Id.*
[119] *Ex parte Beck,* 922 S.W.2d 181 (Tex. Crim. App. 1996).

maximum.[120] This Court agreed to consider his argument. "We have long held that a defect which renders a sentence void may be raised at any time."[121]

[120] *See id.* at 182.

[121] *Id.* Three previous opinions of this Court were cited to show the longstanding nature of the proposition. *See Ex parte White*, 659 S.W.2d 434, 435 (Tex. Crim. App.1983); *Ex parte McIver*, 586 S.W.2d 851, 854 (Tex. Crim. App. 1979); *Ex parte Harris*, 495 S.W.2d 231, 232 (Tex. Crim. App. 1973).

PART NINE: Overview of the State's Arguments

The first eight parts of this brief set the stage for an analysis of the State's arguments. The State essentially makes four arguments assailing the opinion of the First Court of Appeals.[122] These four arguments are:

> The Court of Appeals erred in following the case of *Crawford v. State*[123] (discussed in Part Ten);
>
> The Court of Appeals erred in following the case of *Sierra v. State*[124] (discussed in Part Eleven);
>
> The Court of Appeals erred in holding that an indictment for criminal attempt is fundamentally defective when it does not allege the constituent elements of the underlying offense attempted (discussed in Part Twelve); and
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> Section 15.01(b) of the Penal Code does not apply to the present case because capital murder is not an aggravated offense under the Penal Code (discussed in Part Thirteen).

[122] *See Wood v. State,* 2017 WL 4127835.
[123] *Crawford v. State,* 632 S.W.2d 800 (Tex. App.—Houston [14th Dist.] 1982, pet. ref'd).
[124] *Sierra v. State,* 501 S.W.3d 179 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

PART TEN: The Court of Appeals properly followed its own opinion in *Sierra v. State*

In deciding the case at hand, the Court of Appeals followed numerous opinions of this Court. These opinions are detailed in the first eight parts of this brief. But the First Court of Appeals was not visiting these issues for the first time. Just a year earlier, the Court had decided a very similar case – *Sierra v. State.*[125] Because the Court of Appeals relied heavily on the *Sierra* opinion, a discussion of that case is appropriate here.[126] This is especially the case because the State says the Court of Appeals' "reliance on *Sierra* . . . was misplaced."[127]

Sierra involved a conviction for a first-degree-felony offense that the indictment did not charge. The particulars are set out below.

Section 30.02 of the Penal Code describes the offense of burglary.[128] A person commits an offense if, without the effective consent of the owner, the person:

> (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or

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[125] *Sierra v. State,* 501 S.W.3d 179 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

[126] The *Sierra* case was the focus of Cynthia's supplemental reply brief.

[127] State's Brief at 7. The State said:

> Sierra was charged with a completed burglary, therefore, all the elements of that completed burglary had to be alleged in the indictment. [*Sierra v. State*], 501 S.W.3d at 182. The appellant in this case [Cynthia] was charged with the completed offense of criminal attempt, which was itself based upon an incomplete capital murder. Therefore, the State was not required to plead all the elements of that incomplete capital murder in the indictment. *See Whitlow,* 609 S.W.2d at 809; *Jones,* 576 S.W.2d at 394-395.

[128] *See* Tex. Penal Code Ann. § 30.02 (West 2011).

(2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or

(3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.[129]

Burglary is a state-jail felony if the offense was committed in a building other than a habitation.[130] It is a second-degree felony if the offense was committed in a habitation.[131] And the offense is a first-degree felony if:

(1) the premises are a habitation; and

(2) any party to the offense entered the habitation with intent to commit a felony other than felony theft or committed or attempted to commit a felony other than felony theft.[132]

The indictment in the case read, in pertinent part, as follows:

Luis Ruiz Sierra . . . did then and there unlawfully, with intent to commit a felony, namely, SEXUAL ASSAULT, remain concealed in a habitation owned by [the complainant], a person having a greater right to possession of the habitation than the defendant . . . without the effective consent of the Complainant, namely, without consent of any kind.[133]

[129] Tex. Penal Code Ann. § 30.02(a) (West 2011).
[130] Tex. Penal Code Ann. § 30.02(c)(1) (West 2011).
[131] Tex. Penal Code Ann. § 30.02(c)(2) (West 2011).
[132] Tex. Penal Code Ann. § 30.02(d) (West 2011) (emphasis added). As will become apparent, the underlined portion of the statute is important.
[133] *Sierra v. State,* 501 S.W.3d at 182 (brackets and ellipses in the original) (emphasis added). As will become apparent, the underlined language of the indictment is also important.

Sierra was convicted of the first-degree-felony version of burglary and was sentenced to 30 years in prison.[134] The problem with his conviction and sentence is apparent when one compares the language of the indictment and the language of the first-degree-burglary statute. Sierra was charged with remaining concealed in a habitation. He was not charged with entering the habitation. The first-degree-felony version of burglary only occurs when the defendant "entered" the habitation.[135]

On appeal, Sierra contended that the indictment only charged him with the second-degree-felony version of burglary.[136] The First Court of Appeals agreed:

> Because the indictment alleged burglary by concealment with intent to commit sexual assault, as opposed to burglary by entry, Sierra was charged with a second-degree felony offense, not a first-degree felony offense.[137]

Thus, the Court found the indictment "did not authorize a conviction" for first-degree-felony burglary.[138] But the indictment did authorize a conviction for second-degree-felony burglary.[139] The possible imprisonment for a second-degree felony is 2 to 20 years[140] The 30-year sentence assessed against Sierra was therefore, an illegal sentence. The Court declared:

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[134] *Id.* at 181. The range of imprisonment for a first-degree felony is life or a term between 5 and 99 years. Tex. Penal Code Ann. § 12.32(a) (West 2011).
[135] *See* text accompanying Footnote 132.
[136] *Sierra v. State,* 501 S.W.3d at 181.
[137] *Id.* (emphasis added).
[138] *Id.* at 185.
[139] *See id.*
[140] Tex. Penal Code Ann § 12.33(a) (West 2011).

> The indictment in this case did not authorize a conviction under section 30.02(d) [first-degree-felony burglary]. The crime alleged in the indictment was burglary by concealment with intent to commit a felony under section 30.02(a), which is a second-degree felony with a maximum sentence of 20 years of imprisonment. Therefore, the trial court's sentence of 30 years of imprisonment was illegal, unauthorized, and void.[141]

In reaching its conclusion , the *Sierra* Court cited many of the opinions of this Court that have been recited in this brief. The Court of Appeals cited *Thomason* for the proposition – set out in bold at the conclusion of Part One of this brief – that

> [w]hen "an indictment facially charges a complete offense, it is reasonable to presume the State intended to charge the offense alleged, and none other." Therefore, when the indictment charges a complete offense, "the State is held to the offense charged in the indictment, regardless of whether the State intended to charge that offense.[142]

The Court of Appeals also stressed the concept of "due process" and "notice" explained in Part Three of this brief. Specifically, the Court cited this Court's *Riney* opinion which announced that "the accused is not required to look elsewhere than the indictment for notice."[143]

As discussed in Part Six, the Court of Appeals properly reformed the judgment to reflect a conviction for the offense that the indictment did authorize.[144] Consistent with what Part Seven of this brief recognized, the reformation of a sentence often

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[141] *Sierra v. State,* 501 S.W.3d at 185 (internal citations omitted).
[142] *Id.* at 182-83.
[143] *Id.* at 182.
[144] *Id.* at 185.

leads to an illegal sentence.[145] The Court of Appeals cited both *Mizell v. State* and *Ex parte Rich* in finding Sierra's first-degree-felony burglary conviction to be "illegal, unauthorized, and void."[146]

Finally, the First Court of Appeals quite properly explained – consistent with Part Eight of this brief – that a defendant can complain of an illegal sentence at any time. Citing this Court's opinion in *Mizell v. State,*[147] the Court of Appeals said:

> Any court with jurisdiction may notice and correct an illegal sentence, even if the defendant did not object in the trial court.[148]

In summary, *Sierra* was the perfect embodiment of the principles discussed in Parts One through Eight of this brief. The First Court of Appeals was absolutely justified in relying on *Sierra* as a model in deciding the current case.[149] While *Sierra* is not an opinion of this Honorable Court, the case follows numerous opinions of this Court in reaching its result.

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[145] *See id.*
[146] *Id.*
[147] *Mizell v. State,* 119 S.W.3d at 806.
[148] *Sierra v. State,* 501 S.W.3d at 183. The *Mizell* opinion was featured prominently in the discussion in Parts Seven and Eight of this brief.
[149] Notably, the same prosecutor's office as in the current case (the Harris County District Attorney's Office), declined to petition for discretionary review in *Sierra.*

PART ELEVEN: The Court of Appeals properly relied on *Crawford v. State*

Another case figuring prominently in the First Court of Appeals' opinion in the case at bar is *Crawford v. State.*[150] The *Crawford* opinion was published by the Fourteenth Court of Appeals some 35 years ago – prior to the 1985 constitutional amendment discussed in Part Four.[151] But the opinion still has relevance here despite the State's averment that "*Crawford* is not applicable to the present case."[152]

As the First Court of Appeals noted in its opinion below, nine aggravating circumstances exist that will elevate the offense of murder to capital murder.[153] One of these aggravating circumstances is that the defendant commits murder in the course of committing, or attempting to commit, seven specified crimes.[154] One of these specified crimes is "aggravated sexual assault."[155] Please note that the statute refers to aggravated sexual assault – not just sexual assault.[156]

Back in 1982, the offense of sexual assault in Texas was known as "rape" and the offense of aggravated sexual assault was called "aggravated rape."[157] Consistent with today's capital murder statute, a murder committed in the course of committing,

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[150] *Crawford v. State,* 632 S.W.2d 800 (Tex. App.—Houston [14th Dist.] 1982, pet. ref'd).
[151] *See id.*
[152] *See* State's Brief at 7 ("*Crawford* is not applicable to the present case because Crawford was charged with a completed capital murder whereas the appellant was charged with criminal attempt."). But the State admits the holding in *Crawford* was correct. *See* State's Brief at 6-7.
[153] *See Wood v. State,* 2017 WL 4127835 at *2, *5.
[154] *See* Tex. Penal Code Ann. § 19.03(a)(2) (West 2011).
[155] *See id.*
[156] *Id.*
[157] *See Crawford v. State,* 632 S.W.2d at 801.

or attempting to commit aggravated rape constituted capital murder.[158] A murder committed in the course of committing regular (*i.e.,* not aggravated) rape was not capital murder.[159]

Bruce Crawford was convicted by a jury in a Harris County district court of capital murder.[160] The jury charge authorized the jury to find Crawford guilty of capital murder based on the aggravating circumstance of aggravated rape.[161] There was just one problem. The indictment alleged that Crawford committed the murder in the course of "committing and attempting to commit rape."[162] The indictment spoke of "rape" – not "aggravated rape." Thus, as the Fourteenth Court of Appeals explained, "a fundamental variance existed between the indictment and the charge to the jury."[163] This fundamental variance "allowed the jury to find [Crawford] guilty of an offense not alleged in the indictment."[164]

Given that *Crawford* was decided prior to the 1985 amendments discussed in Part Four above, the concept of fundamental error was still alive and well. Because the indictment did not allege all the elements of capital murder, the Court of Appeals found there to be fundamental error, saying:

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[158] *See id.*
[159] *See id.*
[160] *Id.* at 800.
[161] *Id.* at 801.
[162] *Id.* (emphasis added).
[163] *Id.* at 800.
[164] *Id.*

> We see the instant case as falling within a line of authority by the Court of Criminal Appeals, represented by *Ross v. State,* 487 S.W.2d 744 (Tex. Crim. App. 1972), which has held fundamental error exists when a jury charge authorizes a conviction for an offense not found in the indictment. "The charge erroneously authorized the appellant's conviction under a theory not charged in the indictment. (citation omitted) . . . Even though there was no objection to the charge at the time of trial, the error was fundamental and calculated to injure the rights of the appellant to the extent that he has not had a fair and impartial trial."[165]

The *Crawford* Court ended up reversing the case.[166] The judgment was not reformed to reflect a conviction for murder as would be the case today under the teachings of this Court's *Thomason* opinion. *Thomason,* of course, recognized that "where an indictment facially charges a complete offense, the State is held to the offense charged in the indictment."[167] Thus, under today's laws, fundamental error would not exist because the indictment did not contain an aggravating element transforming murder into capital murder. Rather, an appellate court would likely decide that the *Crawford* indictment charged the complete offense of murder. Thus, the State would be held to the offense charged in the indictment. The indictment would not be fundamentally defective.

The First Court of Appeals in the current case simply cited *Crawford* to show that an indictment for capital murder must include the aggravating element. As noted

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[165] *Id.* at 801 (quoting *Ross v. State,* 487 S.W.2d at 745) (reference to omitted citation in the original).
[166] *Crawford v. State,* 632 S.W.2d at 803.
[167] *See* text accompanying Footnotes 20 and 38.

by the *Crawford* Court, the indictment against Crawford alleged that he committed murder in the course of committing or attempting to commit rape.[168] Rape, the *Crawford* Court said, is "a separate and distinct offense from aggravated rape."[169] And unlike aggravated rape, the offense of rape is not one that, if committed or attempted during a murder, transforms murder into capital murder.[170]

[168] *Crawford v. State,* 632 S.W.2d at 801.
[169] *Id.*
[170] *See id.* ("The indictment, therefore, fails to allege a capital murder offense . . . .").

PART TWELVE: Response to the State's Argument that the Court of Appeals erred in holding that an indictment for criminal attempt is fundamentally defective when it does not allege the constituent elements of the underlying offense attempted

This Court granted the State's ground for review which reads as follows:

> The lower court erred in holding that an indictment for criminal attempt is fundamentally defective when it does not allege the constituent elements of the underlying offense attempted.[171]

A problem with the statement of this ground of review becomes immediately apparent upon reading the First Court of Appeals' opinion. The problem is that the Court of Appeals never said the indictment in this case is fundamentally defective.[172] The words "fundamentally defective" never appear in the Court's opinion.[173] Nor does the opinion say the indictment is "fatally defective.[174] In fact, the Court never even described the indictment as being "defective."[175] The word "defective" does not appear in the opinion at all.[176]

What the Court of Appeals did say is this:

> Although the State intended to charge [Cynthia] with the offense of attempted capital murder, it did not do so because the aggravating factor was missing from the indictment.[177]

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[171] State's Petition for Discretionary Review at 3 (emphasis added).
[172] *See Wood v. State,* 2017 WL 4127835.
[173] *See id.*
[174] *See id.*
[175] *See id.*
[176] *See id.*
[177] *Id.* at *5.

This statement does not mean the indictment was defective. Rather, as the Court of Appeals noted, "the indictment charged a complete offense – attempted murder.[178] There is absolutely nothing wrong with the indictment in this case. The indictment perfectly alleged the second-degree-felony offense of attempted murder. "The crime charged in the indictment was attempted murder which is a second-degree felony offense with a maximum sentence of confinement of twenty years."[179]

Having alleged the complete offense of attempted murder, the indictment caused the State to be held to that offense. Quoting from its *Sierra* opinion (which in turn quoted from this Court's opinion in *Thomason*), the First Court of Appeals put the situation this way:

> Therefore, when the indictment charges a complete offense, "the State is held to the offense charged in the indictment, regardless of whether the State intended to charge that offense."[180]

So the indictment was not "fundamentally defective." Nor was the indictment "fatally defective." In fact, the indictment was not "defective" at all. It just didn't charge the offense the State had intended to charge.

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[178] *Id.*
[179] *Id.* at *6.
[180] *Id.* at *5 (quoting from *Sierra v. State,* 501 S.W.3d at 182-93 which quoted *Thomason v. State,* 892 S.W.2d at 11).

The State is unable to point to anything in the Court of Appeals' opinion declaring the indictment in the current case to be fundamentally defective. The closest the State can come is to say this:

> The court of appeals held that a purported indictment for attempted capital murder is merely an indictment for attempted murder when the State neglects to allege an "aggravating factor" that transforms murder into capital murder.[181]

This is an accurate rendition of what the Court of Appeals said. But it is not at all close to saying the Court of Appeals held the indictment to be fundamentally defective. Nevertheless, the State has persisted in trying to show that something the Court of Appeals never held and never said is wrong. This raises the question of whether the State's petition for discretionary review was improvidently granted. If the Court of Appeals did not hold the indictment fundamentally defective, then how can such a (nonexistent) holding's propriety be appropriate for review?

But for now, Cynthia lays aside the question of whether the petition for discretionary review was improvidently granted. She moves on to address the State's main argument that

> this Court has repeatedly held that an indictment for criminal attempt is not fatally defective for failure to allege the constituent elements of the offense attempted.[182]

[181] State's Brief at 8.
[182] State's Brief at 8.

As support for the above contention, the State relies primarily on two cases – one from 1980 and the other from 1979. The two cases are *Whitlow v. State,*[183] and *Jones v. State.*[184] Obviously, these opinions pre-date the 1985 amendments to Article V, Section 12 of the Texas Constitution and Article 1.14(b) of the Texas Code of Criminal Procedure.[185] This was the era when this Court considered an indictment's failure to allege all of the elements of an offense to be a fundamental defect. Several of this Court's opinions finding such fundamental defects are detailed in Footnote 70 in Part Four of this brief.

Both *Whitlow* and *Jones* are based on the language of the Section 15.01 – the statute describing the offense of criminal attempt.[186] Subsections (a) and (b) are relevant to our discussion here.[187] These two subsections read exactly the same way today as they did at the time of the *Whitlow and Jones* cases:

> Penal Code § 15.01 Criminal Attempt
>
> (a) A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended.
>
> (b) If a person attempts an offense that may be aggravated, his conduct constitutes an attempt to commit the aggravated offense

[183] *Whitlow v. State,* 609 S.W.2d 808 (Tex. Crim. App. [Panel Op.] 1980).
[184] *Jones v. State,* 576 S.W.2d 393 (Tex. Crim. App. [Panel Op.] 1979).
[185] *See* first paragraph of Part Four.
[186] *See* Tex. Penal Code Ann. § 15.01 (West 2011).
[187] Section 15.01 consists of four subsections. *See* Tex. Penal Code Ann. § 15.01 (West 2011). While not relevant to the current analysis, Subsection (d) is important. The subsection reads as follows: "An offense under this section is one category lower than the offense attempted, and if the offense attempted is a state jail felony, the offense is a Class A misdemeanor." Tex. Penal Code Ann. § 15.01(d) (West 2011).

> if an element that aggravates the offense accompanies the attempt.[188]

The *Whitlow* case involved a conviction for the offense of attempted escape.[189] In pertinent part, the indictment alleged that Ace Whitlow

> unlawfully with the specific attempt to commit the offense of escape, did then and there attempt to escape from the custody of the Falls County Sheriff by use of a deadly weapon to-wit: a metal club, said attempt amounting to more than mere preparation that tends but fails to effect the commission of the offense intended . . . .[190]

On appeal, Whitlow argued that his conviction was unauthorized because the indictment did not set out each of the elements of escape.[191] Therefore, claimed Whitlow, the indictment was fundamentally defective.[192]

Whitlow's specific complaint was that the indictment did not allege he had been "under arrest for, charged with, or convicted of a felony."[193] This language is an element of the completed offense of escape.[194] And this Court acknowledged that if Whitlow had been convicted of a consummated escape, his argument would have had merit.[195] But Whitlow had only been convicted of attempted escape. Therefore, his

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[188] Tex. Penal Code Ann. § 15.01(a), (b) (West 2011).
[189] *See Whitlow* v. State, 609 S.W.2d at 808.
[190] *Id.* at 809.
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] *Id.* n. 1.

argument failed. This Court recited the elements of the offense of criminal attempt as follows:

> The elements necessary to establish an offense under V.T.C.A., Penal Code, Section 15.01 the attempt statute comprise: 1) a person, 2) with specific intent to commit an offense, 3) does an act amounting to more than mere preparation that 4) tends, but fails, to effect the commission of the offense intended.[196]

The indictment alleged these four elements.[197] These are the four elements set out in subsection (a) of Section 15.01.[198] Because the indictment alleged each of the required four elements for criminal attempt, this Court found the indictment to not be fundamentally defective.[199]

This Court did not explicitly mention subsection (b) of Section 15.01.[200] This is the subsection saying:

> If a person attempts an offense that may be aggravated, his conduct constitutes an attempt to commit the aggravated offense if an element that aggravates the offense accompanies the attempt.[201]

But this Court did allude to the subsection. The indictment had alleged that Whitlow attempted to escape "by the use of a deadly weapon to-wit: a metal club."[202] This Court said "the additional allegation that it was done with a deadly weapon, a

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[196] *Id.* at 809.
[197] *Id.*
[198] Tex. Penal Code Ann. § 15.01 (West 2011).
[199] *Whitlow v. State,* 609 S.W.2d at 809.
[200] *See id.*
[201] Tex. Penal Code Ann. § 15.01(b) (West 2011).
[202] See text of the indictment accompanying Footnote 190.

metal club, is sufficient to show a felony."[203] Apparently, had this additional allegation not been made, the indictment would not have been sufficient to support a felony.

In its petition for discretionary review and in its brief in the current case, the State relies heavily on the *Whitlow* case.[204] The State cites *Whitlow* for the proposition that:

> an indictment for criminal attempt is not fundamentally defective for failure to allege the constituent elements of the offense attempted.[205]

Cynthia does not disagree with this statement. Indeed, an indictment for criminal attempt is not fundamentally defective for not alleging the elements of the offense attempted. But this is not to say that when a person attempts an aggravated offense, the indictment need not allege the aggravating element. Subsection (b) of Section 15.01 of the Penal Code basically says that the aggravating element must be alleged.[206] And *Whitlow* itself suggests as much: "the additional allegation that it was done with a deadly weapon, a metal club, is sufficient to show a felony."[207]

Whitlow's commission of the escape by the use of a deadly weapon is – in the vernacular of Section 15.01(b) – the "element that aggravates the offense." Without

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[203] *Whitlow v. State*, 609 S.W.2d at 809.
[204] Apparently referencing *Whitlow* and *Jones,* the State said "oral argument is unnecessary because this case involves a simple application of this Courts precedent." State's Petition for Discretionary Review at v.
[205] State's Petition for Discretionary Review at 4; State's Brief at 8.
[206] *See* Tex. Penal Code Ann. § 15.01(b) (West 2011).
[207] *Whitlow v. State,* 609 S.W.2d at 809.

that aggravating element being alleged in the indictment, the indictment would not have supported a felony conviction. Simply alleging the four elements of criminal attempt would not have supported a felony attempted escape conviction in *Whitlow*. To be sure, alleging just the four elements of criminal attempt would have supported a misdemeanor escape conviction. But the felony conviction would not have been supportable.

Thus, the State's attempt to show Cynthia's conviction for attempted capital murder is supportable by an indictment alleging no aggravating element seems to fall flat. At the very least, it can be said that *Whitlow* does not support the State's position.[208]

The Court's opinion in *Jones v. State*[209] preceded the *Whitlow* opinion by a year. *Jones* did not involve any aggravating element and thus there was no explicit or implicit discussion of Penal Code, Section 15.01(b).[210] But this Court did explicitly "hold that

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[208] Although probably done so unwittingly, the State's brief asserts that this Court held the indictment in *Whitlow* to be correct

> because it alleged that the appellant attempted to commit the offense of escape with the additional allegation that it was done with a deadly weapon.

State's Brief at 9-10 (emphasis added).

[209] *Jones v. State,* 576 S.W.2d 393 (Tex. Crim. App. [Panel Op.] 1979).

[210] *See id.* The offense at issue in *Jones* was attempted murder – there was no effort to indict the defendant for attempted capital murder. The defendant, Johnny Ray Jones, argued that the indictment for attempted murder was fundamentally defective for failing to allege each of the elements of murder. *Id.* at 395.

the elements of the offense attempted need not be set out in the attempt indictment."[211] Several of this Court's cases are cited as support for the holding.[212]

Again, as noted earlier, Cynthia takes no issue with the holding of this Court in *Jones*. Cynthia recognizes that an indictment for criminal attempt is not fundamentally defective for failure to allege the constituent elements of the offense attempted.[213] But neither *Whitlow* nor *Jones* holds that if a person is charged with attempting an aggravated offense, the indictment need not allege the aggravating element.

The State cites an additional case from this Court to support its argument that no aggravating element need have been alleged in Cynthia's case. The case is *Morrison v. State.*[214] The State did not elaborate as to why *Morrison* supports its argument. This is perhaps because *Morrison* does not actually provide any support.

In *Morrison,* this Court examined a prior conviction for attempted capital murder that had been introduced at the punishment stage of the defendant's trial.[215] The defendant asserted the conviction was void because one of the elements of

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[211] *Id.* at 395.
[212] These cases include *Williams v. State*, 544 S.W.2d 428, 430 (Tex. Crim. App. 1976) ("indictment for criminal attempt is not fundamentally defective for failure to allege the constituent elements of the offense attempted"); *Gonzales v. State,* 517 S.W.2d 785, 788 (Tex. Crim. App. 1975) ("constituent elements of the particular theft or intended theft need not be alleged in an indictment for burglary with intent to commit theft"); *Earl v. State,* 514 S.W.2d 273, 274 (Tex. Crim. App. 1974).
[213] The State also supports this proposition by citing *Hudson v. State,* 638 S.W.2d 45, 46-47 (Tex. App.—Houston [1st Dist.] 1982, pet. ref'd). *See* State's Brief at 12. Again, Cynthia does not disagree with this general statement.
[214] *Morrison v. State,* 625 S.W.2d 729 (Tex. Crim. App. 1981).
[215] *Id.* at 729.

attempted capital murder was missing.[216] Specifically, the missing element was not an element of the consummated crime of attempted capital murder. Rather, the missing element was actually a combination of the third and fourth elements of criminal attempt.[217] The indictment wholly failed to allege that the defendant did an act amounting to more than mere preparation that tended, but failed, to effect the commission of the offense intended.[218] Accordingly, this Court reversed the judgment of conviction in the case.[219]

In summary, the State has cited ample legal authority for its main proposition. That main proposition is that an indictment for criminal attempt is not fatally defective for failure to allege the constituent elements of the offense attempted. Cynthia does not disagree. But the State cites no authority for the idea that an indictment for attempting an aggravated offense need not allege an aggravating element.

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[216] *Id.* at 730.
[217] *See* text accompanying Footnote 196 for the elements of criminal attempt.
[218] *Morrison v. State,* 625 S.W.2d at 730.
[219] *Id.*

PART THIRTEEN: Response to the State's Argument that Penal Code, Section 15.01(b) does not apply to the present case because Capital Murder is not an aggravated offense

The concluding sentence of the foregoing part of this brief (Part Twelve) deserves another look:

> But the State cites no authority for the idea that an indictment for attempting an aggravated offense need not allege an aggravating element.

This is the starting point for the discussion here in Part Thirteen. The State not only cites no authority for this idea, but actually recognizes that an indictment for an aggravated offense must allege the aggravating element. Here is the statement of recognition in the State's Brief:

> Section 15.01(b) provides that "[i]f a person attempts an offense that may be aggravated, his conduct constitutes an attempt to commit the aggravated offense if an element that aggravates the offense accompanies the attempt." Tex. Penal Code § 15.01(b) (West 2012). Section 15.01(b) did not apply to this case because capital murder is not an "aggravated offense" under the Texas Penal Code.[220]

So the State agrees with Cynthia that an aggravated element must be alleged in an indictment for an attempt to commit an aggravated offense. The State agrees that the four elements of "criminal attempt" are not enough when it comes to an indictment for an attempted aggravated offense.[221] This, the State recognizes, is the

[220] State's Brief at 13 (brackets and quotation marks in original).
[221] *See* text accompanying Footnote 196 setting out the elements of criminal attempt.

import of Section 15.01(b). But the State argues that Section 15.01(b) does not apply to Cynthia's case. The State's reasoning is that capital murder is not an aggravated offense.

The State's reason for concluding that capital murder is not an aggravated offense is that the offense of capital murder is not entitled "aggravated murder."[222] The State notes that "[m]any crimes have an aggravated variant."[223] As examples, the State lists[224] aggravated assault,[225] aggravated robbery,[226] aggravated sexual assault,[227] aggravated kidnapping,[228] aggravated perjury,[229] and aggravated promotion of prostitution.[230] The State then says:

> **In each and every case, the aggravated offense is explicitly designated so by its statutory title.**[231]

This is demonstrably false. Many offenses contain an aggravating element, but do not have the word "aggravated" in their title.[232] Seven examples follow:

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[222] *See* State's Brief at 13.
[223] *Id.*
[224] *Id.*
[225] Tex. Penal Code Ann. § 22.02 (West 2011).
[226] Tex. Penal Code Ann. § 29.03 (West 2011).
[227] Tex. Penal Code Ann. § 22.021 (West 2011 & Supp. 2017).
[228] Tex. Penal Code Ann. § 20.04 (West 2011).
[229] Tex. Penal Code Ann. § 37.03 (West 2016).
[230] Tex. Penal Code Ann. § 43.04 (West Supp. 2017).
[231] State's Petition for Discretionary Review at 8 (bold type added for emphasis); State's Brief at 13 (bold type added for emphasis). The State contrasts Texas with Utah and New York. In both Utah and New York, offenses entitled "aggravated murder" exist. *See* State's Brief at 14. But in Texas there is no offense entitled "aggravated murder." Instead, Texas has "capital murder." *See id.*
[232] Section 15.01(b) specifically refers to "an offense that may be aggravated." Nothing in the language indicates the statute applies only to offenses with the word "aggravated" in the title.

Example One – Misapplication of Fiduciary Property

The offense of "misapplication of fiduciary property" is codified in Section 32.45 of the Penal Code which, in pertinent part, says:

> (b) A person commits an offense if he intentionally, knowingly, or recklessly misapplies property he holds as a fiduciary or property of a financial institution in a manner that involves a substantial risk of loss to the owner of the property or to a person for whose benefit the property is held.
>
> (c) An offense under this section is :
>
> (1) a Class C misdemeanor if the value of the property misapplied is less than $100;
> (2) a Class B misdemeanor if the value of the property misapplied is $100 or more but less than $750;
> (3) a Class A misdemeanor if the value of the property misapplied is $750 or more but less than $2,500;
> (4) a state jail felony if the value of the property misapplied is $2,500 or more but less than $30,000;
> (5) a felony of the third degree if the value of the property misapplied is $30,000 or more but less than $150,000;
> (6) a felony of the second degree if the value of the property misapplied is $150,000 or more but less than $300,000; or
> (7) a felony of the first degree if the value of the property misapplied is $300,000 or more.[233]

In *Bowen v. State,*[234] this Court distinguished the offense's "essential elements" in Subsection (b) from its "aggravating element" in Subsection (c):

> Here, the State has met its burden of proving the essential elements of the offense of misapplication of fiduciary property beyond a reasonable doubt, but the amount of property shown to have been misapplied, an aggravating element of the offense, was legally insufficient to support a first-degree felony conviction. The value of the property misapplied was

[233] Tex. Penal Code Ann. § 32.45 (West Supp. 2017).
[234] *Bowen v. State,* 374 S.W.3d 427 (Tex. Crim. App. 2012).

> approximately $103,344, which supports a felony conviction in the second degree. Accordingly, the judgment must be reformed to reflect a second degree felony.[235]

Despite the fact that the offense has an aggravating element, the offense is not statutorily labeled as an "aggravated" offense. This is the case whether the aggravating element makes the offense a Class B misdemeanor, a first-degree felony, or something in between.

Example Two – Class B Misdemeanor DWI

Class B Misdemeanor DWI is an offense that may be aggravated to become Class A Misdemeanor DWI.[236] The offense is aggravated if an "aggravating element" (also known as an "aggravating factor") exists. As noted by the Fourteenth Court of Appeals just last year:

> [T]he Class B misdemeanor is a lesser-included offense of the Class A misdemeanor. The only difference between the two offenses is that the Class A misdemeanor requires additional proof of the aggravating element.[237]

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[235] *Id.* at 432 (emphasis added). *See also Martinez v. State,* No. 08-13-00363-CR, 2016 WL 2864952 at *3 (Tex. App.—El Paso May 13, 2016, no pet.) (mem. op. not designated for publication) ("The value of the property misapplied or unlawfully appropriated is an aggravating element for . . . misapplication of fiduciary property.").

[236] The basic Class B Misdemeanor DWI offense is codified in Tex. Penal Code Ann. § 49.04(a), (b) (West Supp. 2017).

[237] *Ex parte Navarro,* 523 S.W.3d 777, 780 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) (emphasis added).

The aggravating element is "that an analysis of a specimen of the person's blood, breath, or urine showed an alcohol concentration level of 0.15 or more at the time the analysis was performed."[238] Class A Misdemeanor DWI is not statutorily entitled "Aggravated DWI."[239]

Additionally, Class B Misdemeanor DWI can be enhanced to a third-degree felony commonly known as Felony DWI.[240] This enhancement occurs if it is shown that the defendant has twice previously been convicted of DWI or a related offense.[241] This Court has unanimously suggested that such an enhancement <u>is</u> an aggravating element:

> It is much easier to say that the lesser-included offense has been proven in cases in which the evidence is legally insufficient only as to an aggravating element, as in *Bowen*. There the State charged the defendant with misapplication of fiduciary property in an amount over $200,000. While the State proved the misapplication of fiduciary property, its indictment alleged only one owner of the misapplied property. Consequently, the State proved only that the part owned by the named victim was misappropriated, not the entire amount. In that case, it was easy for the Court of Appeals to render a verdict for the lesser-included offense because there was no question that the essential elements of the lesser crime were proven. <u>It would be a similar situation if the State charged someone with felony DWI and presented legally sufficient evidence of the DWI conduct but not of the enhancing prior conviction. In such a situation it is easy to strike the aggravating element and reform the judgment to reflect the crime without the enhancement.</u>[242]

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[238] *See* Tex. Penal Code Ann. § 49.04(d) (West Supp. 2017).
[239] *See id.*
[240] Tex. Penal Code Ann. § 49.09(b) (West Supp. 2017).
[241] *Id.*
[242] *Britain v. State*, 412 S.W.3d 518, 521 (Tex. Crim. App. 2013) (emphasis added).

Significantly, the crime we colloquially call Felony DWI is not denominated as "Aggravated DWI."

Example Three – Certain Drug Offenses

As explained in Example One above, the amount of property misapplied is an aggravating element of the offense of misapplication of fiduciary property. Similarly, the amount of drugs possessed, manufactured, or delivered is an aggravating element of certain drug crimes. The offense entitled "Possession of Substance in Penalty Group 2-A illustrates this concept.[243] The minimum offense is a Class B misdemeanor for possession of two ounces or less.[244] As the amount of the drug possessed increases, the classification of the offense becomes more serious. For example, possession of "50 pounds or less but more than 5 pounds" is a third-degree felony.[245]

In her dissent in *Thornton v. State,*[246] Judge Alcala said aggravating elements of offenses included such elements as "a particular dollar amount or drug amount."[247] Thus, the amount of a Penalty-Group-2-A drug possessed by a defendant is an aggravating element of the offense of possession of that type of drug.[248] Significantly,

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[243] *See* Tex. Health & Safety Code § 481.1161 (West 2017).
[244] *Id.*
[245] *Id.*
[246] *Thornton v. State,* 425 S.W.3d 289, 314 (Tex. Crim. App. 2014) (Alcala, J., dissenting).
[247] *Id.* at 315.
[248] Judge Alcala's statement identifying the amount of a drug possessed as an aggravating element was not a point of dispute.

drug offenses are not labeled as "aggravated offenses" – no matter how great the quantity of the drug.[249] This has not always been the case. For example, in past years, there was an offense known as "aggravated possession of marihuana."[250] No offense of that name exists today.[251] But even though designations of certain drug crimes as "aggravated" offenses have been eliminated, the aggravating factors remain.[252]

Example Four – Sexual Assault

Penal Code, Section 22.011 codifies "Sexual Assault"[253] – a second-degree felony.[254] A different Penal Code provision – Section 22.021 – establishes the offense of "Aggravated Sexual Assault"[255] which is a first-degree felony.[256] Any one of eight separate aggravating factors can turn sexual assault into aggravated sexual assault.[257]

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[249] *See e.g.,* Tex. Health & Safety Code § 481.1161 (West 2017) (possession of Penalty Group 2-A drugs); Tex. Health & Safety Code § 481.117 (West 2017) (possession of Penalty Group 3 drugs); Tex. Health & Safety Code § 481.121 (West 2017) (possession of marihuana).

[250] *See e.g., Young v. State,* 922 S.W.2d 676 (Tex. App.—Beaumont 1996, pet. ref'd) (citing Tex. Health & Safety Code Ann. § 481.121(c) & (d) (Vernon Supp 1992).

[251] *See* the statutes currently setting out marijuana offenses. Tex. Health & Safety Code Ann. § 481.120 (West 2017) (Offense: Delivery of Marihuana); Tex. Health & Safety Code Ann. § 481.121 (West 2017) (Offense: Possession of Marihuana); Tex. Health & Safety Code Ann. § 481.122 (West 2017) (Offense: Delivery of Controlled Substance or Marihuana to Child). None of these statutes refer to an "aggravated" offense such as "aggravated delivery" or "aggravated possession."

[252] For example, the amount of marihuana that would result in "aggravated possession" in *Young* was "more than 50 pounds, but less than 200 pounds." *Young v. State,* 922 S.W.2d at 678. A conviction for possession of such an amount of marihuana today would be a second-degree felony. *See* Tex. Health & Safety Code Ann. § 481.121(b)(5) (West 2010).

[253] Tex. Penal Code Ann. § 22.011 (West 2011).

[254] Tex. Penal Code Ann. § 22.011(f) (West 2011).

[255] Tex. Penal Code Ann. § 22.021 (West Supp. 2017).

[256] Tex. Penal Code Ann. § 22.021(e) (West Supp. 2017).

[257] These eight aggravating factors are listed in Subsection (a)(2) of Section 22.021. In the interest of brevity, all eight factors will not be detailed here. But two representative aggravating factors are the

So why does this brief include sexual assault as an example of an offense containing an aggravating element without the word "aggravated" in its title? The answer is twofold.

First, there is one other aggravating factor that does not result in sexual assault being transformed into "aggravated sexual assault."[258] This aggravating factor is that

> the victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married under [Penal Code] Section 25.01 [Bigamy].[259]

This aggravating factor transforms second-degree sexual assault into first-degree sexual assault.[260] But this first-degree sexual assault is not labeled as "aggravated sexual assault." This Court dealt with this aggravating factor just last year in the case of *Arteaga v. State.*[261]

In *Arteaga,* the State alleged the defendant "committed first degree felony sexual assault of a child because he was 'prohibited from marrying' the victim, his biological daughter."[262] Significantly, this Court recognized that the title of the alleged offense was not "aggravated sexual assault." Thus, this Court acknowledged that an

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use of a deadly weapon and the fact that the victim is elderly or disabled. Tex. Penal Code Ann. § 22.021(a)(2) (West Supp. 2017).

[258] This aggravating factor is separate from the eight aggravating factors listed in Section 22.021(a)(2) that transform sexual assault into aggravated sexual assault.

[259] Tex. Penal Code Ann. § 22.011(f) (West 2011).

[260] *Id.*

[261] *Arteaga v. State,* 521 S.W.3d 329 (Tex. Crim. App. 2017).

[262] *Id.* at 331 (emphasis added).

aggravating factor can transform an offense into a more serious offense without labeling the more serious offense as "aggravated."

Second, the "aggravated sexual assault" statute itself calls for a punishment beyond the standard first-degree felony punishment if a certain aggravated element exists. Specifically, the aggravated element in question is that the victim of the offense is younger than six years of age.[263] If such an aggravated element exists, the minimum term of imprisonment for the first-degree felony offense of aggravated sexual assault is increased to 25 years.[264] (By comparison, the minimum term of imprisonment for a standard first-degree felony is five years.)[265] In *Arteaga,* this Court acknowledged the existence of this aggravating factor, but did not term the resultant offense "aggravated aggravated sexual assault:

> Moreover, if the child is younger than six years of age at the time of the commission of the offense, which this victim was during a period of the abuse, then the defendant not only can be charged with first-degree aggravated sexual assault, he is also subject to a minimum of 25 years' confinement.[266]

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[263] Tex. Penal Code Ann. § 22.021(f)(1) (West Supp. 2017).
[264] *Id.*
[265] *See* Tex. Penal Code Ann. § 12.32(a) (West 2011). The aggravated-sexual-assault statute actually countenances one additional aggravating factor that can result in the increased punishment described above. This aggravating factor is

> The victim of the offense is younger than 14 years of age at the time the offense is committed and the actor commits the offense in a manner described by Subsection (a)(2)(A).

Tex. Penal Code Ann. § 22.021(f)(2) (West Supp. 2017).
[266] *Arteaga v. State,* 521 S.W.3d at 337.

Example Five – Cruelty to Nonlivestock Animals

Section 42.092 of the Penal Code is entitled "Cruelty to Nonlivestock Animals."[267] Last year in *Justice v. State*,[268] the Fourteenth Court of Appeals described the statute as follows:

> The cruelty statute establishes three grades of offenses. If the criminal conduct is the neglect or abandonment of an animal, the offense is a Class A misdemeanor. *See* Tex. Penal Code § 42.092(c). If the criminal conduct is the torture or killing of an animal in a cruel manner, the offense is a state jail felony. *Id.* <u>These degrees may be affected by proof of an aggravating element</u>. If the State establishes that the defendant has two prior cruelty convictions, then an offense based on the neglect or abandonment of an animal is a state jail felony, and an offense based on the torture or killing of an animal in a cruel manner is a third degree felony. *Id.*[269]

So the aggravating element is the existence of two prior animal cruelty convictions. The aggravating element results in a new higher-level offense. But the aggravating element does not result in a new higher-level offense with the word "aggravated" in the statutory title.

Example Six – Theft

There is no such offense as aggravated theft. Rather, there are different levels of theft.[270] The least serious level of theft is a Class C misdemeanor.[271] This level of

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[267] *See* Tex. Penal Code § 42.092 (West Supp. 2017).
[268] *Justice v. State,* 532 S.W.3d 862 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (emphasis added).
[269] *Id.* at 864-65.
[270] Tex. Penal Code Ann. § 31.03 (West Supp. 2017).
[271] Tex. Penal Code Ann. § 31.03(e)(1) (West Supp. 2017).

theft exists "if the value of the property stolen is less than $100.[272] The most serious level of theft is a first-degree felony.[273] This level of theft exists "if the value of the property stolen is $300,000 or more."[274] And there are several other levels of theft in between these two extremes.[275]

As noted by this Court in *Calton v. State,* "the property's value is an element of the offense."[276] And what kind of element is it? The El Paso Court of Appeals recognized this element to be an "aggravating element" in a 2016 opinion:

> The value of the property misapplied or unlawfully appropriated is an aggravating element for both misapplication of fiduciary property and theft.[277]

The Second Court of Appeals has also noted that the value of the property stolen is an aggravating element of the offense of theft:

> The value of the property unlawfully appropriated is an aggravating element. Finally, Appellant contends the evidence was insufficient to show the database had a value of $100,000 but less than $200,000, as alleged in the indictment. Under Texas law, the value of the property taken is an essential element of the offense [of theft]. See *Simmons v. State*, 109 S.W.3d 469, 478–79 (Tex. Crim. App. 2003). See TEX. PENAL CODE ANN. § 31.03(e); *Calton v. State*, 176 S.W.3d 231, 235 (Tex.Crim.App.2005).[278]

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[272] *Id.*
[273] Tex. Penal Code Ann. § 31.03(e)(7) (West Supp. 2017).
[274] *Id.*
[275] *See* Tex. Penal Code Ann. § 31.03(e) (West Supp. 2017).
[276] *Calton v. State,* 176 S.W.3d 231, 235 (Tex. Crim. App. 2005).
[277] *Martinez v. State,* 2016 WL 2864952 at 3 (emphasis added).
[278] *Hardison v. State,* No. 08-14-00115-CR, 2016 WL 1730282 at *4 (Tex. App.—Fort Worth April 29, 2016, no pet.) (mem. op. not designated for publication) (emphasis added).

This Court understands that although the amount of money stolen is an aggravating element of theft, the resultant offense is not called "aggravated theft." Rather, the resultant offense goes by a different name. In *Simmons v. State,* this Court said:

> A person commits the state jail felony offense of theft if "he unlawfully appropriates property with intent to deprive the owner of property" and "the value of the property stolen is $1,500 or more but less than $20,000."[279]

Example Seven – Escape

We return now to the familiar case of *Whitlow v. State*[280] on which the State bases so much of its argument.[281] The offense in question was attempted escape.[282] The offense of escape is generally a Class A misdemeanor.[283] But there are a variety of aggravating factors that serve to make the offense of escape a felony of some sort.[284]

The aggravating factor in the *Whitlow* cases was the fact that the defendant (Ace Whitlow) used a deadly weapon. As this Court noted:

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[279] *Simmons v. State,* 109 S.W.3d 469, 472 (Tex. Crim. App. 2003) (emphasis added). Interestingly, the amount of money stolen is not only an "aggravating element" of the offense of theft, but also an "essential element." The amount of money stolen is also an essential element because if there is no amount of money stolen, there is no offense. *See Simmons v. State,* 84 S.W.3d 810, 813 (Tex. App.—Houston [1st Dist.] 2002), *rev'd,* 109 S.W.3d 469, 471 (Tex. Crim. App. 2003) ("The value of the property in question is an essential element of the offense of theft."). *See also Davila v. State,* 956 S.W.2d 587, 589 (Tex. App.—San Antonio 1997, pet. ref'd) (same).

[280] *Whitlow v. State,* 609 S.W.2d 808 (Tex. Crim. App. 1980).

[281] *See* State's Brief at 8-17.

[282] *See Whitlow v. State,* 609 S.W.2d at 808.

[283] Tex. Penal Code Ann. § 38.06(b) (West 2016).

[284] *See* Tex. Penal Code Ann. § 38.06(c), (d) (e) (West 2016).

> The indictment alleged [Ace] attempted to commit the offense of escape and the additional allegation that it was done with a deadly weapon, a metal club, is sufficient to show a felony.[285]

When committed with a deadly weapon, the offense of escape is a first-degree felony under current law.[286] But the offense is not referred to as "aggravated" escape. The same holds true for the offense of attempted escape. If the escape is attempted with a deadly weapon, the offense is not referred to as "aggravated attempted escape." Thus, the case on which the State relies most heavily – *Whitlow* – actually undercuts its own argument.

What we Learn from the Seven Examples

Contrary to the State's argument, not all offenses that can be aggravated are "explicitly designated so by [their] statutory title."[287] In other words, not all offenses that can be aggravated are denominated as "aggravated _____."[288] The foregoing examples demonstrate this to be the case.[289]

Moreover, this Court has found the offense of murder itself can contain aggravating elements. In *Rodriquez v. State,*[290] this Court held that Texas had territorial

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[285] *Whitlow v. State,* 609 S.W.2d at 809.
[286] Tex. Penal Code Ann. § 38.06(e)(2) (West 2016).
[287] *See* State's Petition for Discretionary Review at 8 and State's Brief at 13 ("In each and every case [that an offense may be aggravated], the aggravated offense is explicitly designated so by its title").
[288] *E.g.,* aggravated kidnapping, aggravated assault, aggravated sexual assault, etc.
[289] The seven examples are not meant to comprise an exhaustive list.
[290] *Rodriguez v. State,* 146 S.W.3d 674, 767-77 (Tex. Crim. App. 2004).

jurisdiction over a capital murder prosecution.[291] This was because the aggravating factor of kidnapping took place in Texas and was an element of the offense of capital murder.[292] Thus, capital murder is – to use the State's wording – an "aggravated variant" of murder.[293] But the aggravated variant is not called "aggravated murder." Rather, in Texas we use the term "capital murder."

Contrary to the State's assertion,[294] capital murder in Texas is an aggravated offense. To quote the Court of Appeals in this case:

> Capital murder is murder. But, it is murder that is accompanied by an aggravating factor that provides the State with a greater range of punishment than that which applies to the offense of murder.[295]

In other words, capital murder is aggravated murder – it simply uses the word "capital" instead of the word "aggravated." And as the world's most famous wordsmith has written:

> What's in a name? That which we call a rose By any other word would smell as sweet.[296]

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[291] *Id.*
[292] *Id. See also Gonzales v. State,* No. 08-14-00293-CR, 2017 WL 360690 at *2, n.2 (Tex.App.—El Paso 2017, pet. granted) (referring to the aggravating elements in a capital murder case as "predicate elements for the capital murder charge").
[293] *See* State's Brief at 13.
[294] *See id.*
[295] *Wood v. State,* 2017 WL 4127835 at *5.
[296] WILLIAM SHAKESPEARE, ROMEO AND JULIET, act 2, sc. 2 (capitalization in original).

Addressing the State's Legislative History Argument

The State suggests two additional reasons that Section 15.01(b) applies only to offenses with the word "aggravated" in the title. The first of these reasons is the statute's legislative history.[297]

The State notes that the Legislature added Subsection (b) to Section 15.01 in 1975 via House Bill 284.[298] Quoting a House Study Group bill analysis,[299] the State says the impetus behind Subsection (b)'s addition was to facilitate aggravated rape prosecutions.[300] From the snippets of the bill analysis quoted by the State, this is hardly clear. But even if this were the reason the Legislature created Subsection (b), it does not follow that the subsection is inapplicable to capital murder.[301]

Moreover, there is no reason to analyze the legislative history behind the creation of Subsection (b). Only if a statute's language is ambiguous or would lead to absurd results, should a court consider legislative history.[302] Here, the text of Subsection (b) is not ambiguous. Nor would applying the subsection to capital murder and attempted capital murder be an absurd result.

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[297] *See* State's Brief at 10 ("the circumstances of how subsection (b) was added to Section 15.01 demonstrate that it was intended to apply to offenses that are denoted 'aggravated' in the Penal Code").
[298] *See* State's Brief at 10.
[299] *See id.*
[300] *See id.*
[301] Nor does it follow that the subsection would not apply to attempted capital murder.
[302] *Boykin v. State,* 818 S.W.2d 782, 785-86 (Tex. Crim. App. 1991) (only if statute's language is ambiguous should court consider legislative history).

Addressing the State's Attempted Robbery Argument

We now address the second additional reason the State says Section 15.01(b) applies only to offenses with the word "aggravated" in the offense title. The State reasons that:

> The lower court's original opinion would have made every offense into an "aggravated offense" if it contained any lesser-included offense. . . . Therefore, robbery would be both an aggravated theft and an aggravated assault because both theft and assault can be lesser-included offenses of robbery. . . . Under the lower court's logic, an indictment for attempted robbery would have to allege the aggravating elements that accompanied the theft and the assault. . . . But this Court has repeatedly held that there is no such pleading requirement. *See Whitlow,* 609 S.W.2d at 809; *Jones,* 576 S.W.3d at 394-95.[303]

Actually, it is the State's logic that is in question here. Robbery is defined as follows:

> A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he: (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.[304]

As the above definition reveals, robbery consists of the offense of theft plus one of two aggravating factors.[305] Thus, an indictment for attempted robbery would,

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[303] State's Brief at 14-15 (internal citations omitted).

[304] Tex. Penal Code Ann. § 29.02 (West 2011).

[305] One of the aggravating factors is not even the same as an element of assault. *See Williams v. State,* 827 S.W.2d 614, 616 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd). The *Williams* Court said:

> We note that an element of the crime of robbery, "*places* another in fear of imminent bodily injury," differs from an often compared, but vastly dissimilar element of the

it seems, need to allege an attempt to commit theft and one of the two aggravating circumstances. There would be no need to allege the constituent elements of theft. *Whitlow* and *Jones* do not hold otherwise.[306]

crime of assault, "*threatens* another with imminent bodily injury. *Id.* (emphasis in original).

[306] In any event, the question of what elements must be contained in an indictment for attempted robbery is beyond the scope of this appeal.

PART FOURTEEN: Recap of Cynthia's Argument

The State intended to charge Cynthia with the offense of attempted capital murder. But the State failed to do so because the indictment did not allege an aggravating element transforming attempted murder into attempted capital murder.

The State attempts to justify its failure by asserting that an aggravating factor need not be alleged when the charged offense is criminal attempt. As Cynthia explains, however, the case law simply does not support the State's argument. Rather, the outcome of the case is controlled by this Court's opinion in *Thomason*.

PRAYER

Cynthia Wood respectfully prays that this Court first consider whether the petition for discretionary review was improvidently granted.[307] Assuming the petition was appropriately granted, Cynthia prays that this Court affirm the decision of the First Court of Appeals.

Respectfully submitted,

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[307] *See* the discussion of this issue at the outset of Part Twelve of this brief; *see also* the section of this brief entitled "Issue Presented" on page 13.

CERTIFICATE OF SERVICE

I certify that on February 27, 2018, I provided this brief to the Harris County District Attorney via the EFILETEXAS.gov e-filing system.[308] Additionally, I certify that on February 27, 2018, I provided this brief to the State Prosecuting Attorney via the EFILETEXAS.gov e-filing system.[309]

/s/ Ted Wood
TED WOOD
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Attorney for Respondent

[308] This service is required by Texas Rule of Appellate Procedure 9.5.
[309] This service is required by Texas Rules of Appellate Procedure 68.11 and 70.3.

CERTIFICATE OF COMPLIANCE

As required by the Texas Rules of Appellate Procedure, I certify that this brief contains 14,885 words.[310] This word-count is calculated by the Microsoft Word program used to prepare this brief. The word-count does not include those portions of the brief exempted from the word-count requirement.[311] The number of words permitted for this type of computer-generated brief (a brief in response in an appellate court) is 15,000.[312]

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[310] Tex. R. App. P. 9.4(i)(3).
[311] *See* Tex. R. App. P. 9.4(i)(1).
[312] *See* Tex. R. App. P. 9.4(i)(2)(B).